

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1142

**United States Court of Appeals
For the Second Circuit**

B
P/S

UNITED STATES OF AMERICA,

Appellee,

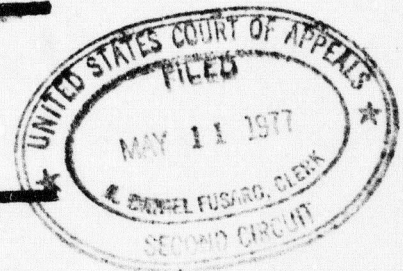
v.

ANTHONY CICCONE, a witness
before the Grand Jury,

Contemnor-Appellant.

*On Appeal from an Order of the United States
District Court for the Southern District of New York*

APPELLANT'S BRIEF



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

X-----X

IN RE:

ANTHONY CICCONE, a witness
before the Grand Jury.

X-----X

CONTEMNOR-APPELLANT'S BRIEF

Preliminary Statement

This is an appeal from the Order of the HONORABLE MARVIN FRANKEL, rendered in the U.S. District Court for the Southern District of New York, on the 2nd day of March 1977, granting the application of the government for an Order of Confinement pursuant to Title 28, U.S.C. Section 1826 (a) and ordering that the Contemnor-Appellant, Anthony Ciccone, be committed to the custody of the Attorney General of the United States at the Metropolitan Correctional Center, New York, New York until such time as he is willing to testify before the October 16, 1975 Special Grand Jury or until the expiration of the term of the Grand Jury but in no event more than eighteen (18) months. The Court determined that Anthony Ciccone had refused unlawfully to testify before the Grand Jury on March 2, 1977, despite his contention that he had "just cause" for his refusal (pursuant to the provisions of Title 28, U.S.C. 1826 (a)) in that he was medically unfit to testify.

STATEMENT OF ISSUES PRESENTED
FOR REVIEW

1. Were the procedures anteceding the Contempt Order sufficient to provide the Contemnor-Appellant with the uninhibited, full and fair hearing constitutionally required by the Due Process Clause?
2. Was the failure of the government to make a foundational showing of relevance as required by the Due Process Clause, a bar to a civil committment for contempt under 28 U.S.C. 1826 (a)?

STATEMENT OF THE COURSE OF
PROCEEDINGS AND DISPOSITION
IN THE COURT BELOW

Mr. Anthony Ciccone, the contemnor-appellant was subpoenaed to appear before the October 16, 1975, Special Grand Jury of the U.S. District Court for the Southern District on December 13, 1976. Due to ill health he was unable to appear.

The Grand Jury Subsequently issued another subpoena requiring contemnor-appellant to appear and give testimony before the Grand Jury on February 28, 1977. When the contemnor-appellant refused to testify, he was brought before the Hon. Marvin Frankel, District Judge for U.S. District Court, Southern District of New York. The proceedings were adjourned to March 2, 1977, whereupon Judge Frankel ordered that the contemnor-appellant Ciccone be granted testimonial immunity pursuant to Title 18 USC Section 6002 and directed that he testify before the Special Grand Jury. Contemnor-Appellant, Ciccone, persisted in his refusal to testify and immediately thereafter (on March 2, 1977) Judge Frankel granted the government's application for an order of confinement pursuant to Title 28, USC Section 1826 (a) committing the contemnor-appellant, Ciccone to the custody of the Attorney General of the United States at the Metropolitan Correction Center, New York, New York, until such time as he is willing to testify before the Special Grand Jury of October 16, 1975, or until the expiration of the term of the Special Grand Jury (but in no event, more than eighteen (18) months).

Contemnor-appellant Ciccone is now in jail at the Metropolitan Correctional Center. Application for bail was denied on May 4, 1977.

before the Honorable Justice Knapp.

STATEMENT OF FACTS

Mr. Anthony Ciccone, the Contemnor-Appellant, was subpoenaed to appear before the October 16, 1975, Special Grand Jury of the U.S. District Court for the Southern District on December 13, 1976. Due to ill health, Mr. Ciccone was unable to appear.

The Grand Jury issued another subpoena requiring the Contemnor-Appellant to appear and give testimony before the Grand Jury on February 28, 1977. Mr. Ciccone, his attorney Richard D. Friedman and the Assistant United States Attorney appeared before the Honorable Justice Marvin Frankel on February 28, 1977 and at that time, a written medical report from Dr. Impastato, Mr. Ciccone's physician, was presented to the Court in support of Mr. Ciccone's position that he was medically unfit to testify. The report indicated that Mr. Ciccone had been suffering from convulsive seizures which were apt to recur during periods of stress. The medical report also indicated that the Contemnor-Appellant's scheduled appearance to testify before the Special Grand Jury was a source of great stress to him.

On the basis of this medical report, Judge Frankel was unwilling to order Mr. Ciccone, the Contemnor-Appellant, to testify. Instead, he directed that Mr. Ciccone be examined by a government selected doctor and requested that Mr. Ciccone, Mr. Friedman and Mr. Abzug return Wednesday morning, March 2, 1977.

On March 2, 1977, Mr. Abzug, the Assistant U.S. Attorney and Mr. Friedman, Contemnor-Appellant Anthony Ciccone's attorney, appeared again before the Honorable Justice Marvin Frankel. Mr. Abzug presented a written report

by a government selected physician (Dr. Moldaver) as was requested by Judge Frankel on February 28, 1977. This report contained a diagnosis of Contemnor-Appellant's condition but made no reference as to whether or not his health would be impaired by testifying.

After submitting the medical report, Mr. Abzug made two applications: 1) that the Contemnor-Appellant be required to testify before the Special Grand Jury of October 16, 1975, and 2) that the Judge grant an Order giving Contemnor-Appellant Ciccone testimonial immunity pursuant to Title 18, U.S.C. Section 6002.

Mr. Friedman reiterated his objection to the granting of these applications. He relied on the written report of Dr. Impastato and the fact that the stress of appearing before the Grand Jury substantially increased Mr. Ciccone's risk of suffering convulsive seizures, therefore, jeopardizing his life.

On that same day (March 2, 1977), after very summary proceedings (brief oral discussion and the presentation of two (2) medical reports implying contradictory conclusions) Judge Frankel ordered that the Contemnor-Appellant Ciccone be granted testimonial immunity pursuant to Title 18, U.S.C. Section 6002 and directed that he testify before the Special Grand Jury. Contemnor-Appellant Ciccone persisted in his refusal to testify, and immediately thereafter (on March 2, 1977), Judge Frankel granted the government's application for an Order of Confinement pursuant to Title 28, U.S.C. Section 1826 (a), committing the Contemnor-Appellant Ciccone to the custody of the Attorney General of the United States at the Metropolitan Correction Center, New York, New York, until such time as he is willing to testify before the

Special Grand Jury of October 16, 1975, or until the expiration of the term of the Special Grand Jury (but in no event, more than eighteen (18) months).

Contemnor-Appellant Ciccone is now in jail at the Metropolitan Correction Center. Application for bail was denied on May 4, 1977, before the Honorable Justice Knapp.

POINT I

THE PROCEDURES ANTECEDING THE CONTEMPT
ORDER DEPRIVED CONTEMNOR-APPELLANT
OF DUE PROCESS

Anthony Ciccone, the Contemnor-Appellant, was deprived of due process when Judge Frankel (the U.S. District Court Judge) ordered that he be confined pursuant to Title 28, U.S.C. Section 1826 (a), the Recalcitrant Witness Statute which provides in pertinent part that:

"Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify. . . the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony. . ." (emphasis added)

The Courts have held that a proceeding in contempt under Title 28, U.S.C. Section 1826 (a) to compel testimony before a Federal Grand Jury is civil enough to preclude a trial by jury but criminal enough to require the application of Rule 42 (b). U.S. v. Alter, 482 F.2d 1016 (1973). Rule 42(b) entitles Ciccone to "notice and a reasonable time to prepare his defense; i.e. to show just cause for refusing to respond." U.S. Alter, supra., at 1023.

"The Due Process Clause thus requires that the rudimentary concepts of fair play reflected in Rule 42(b) be applied to afford a real opportunity to meet the just-cause criterion of Section 1826 (a)." U.S. v. Dinsio, 468 F.2d 1392, 1394 (1972)

Mr. Ciccone, the Contemnor-Appellant, made a prima facie showing that he had "just cause" for refusing to respond before the Grand Jury. He presented a written medical report indicating that he had been suffering from

convulsive seizures which were apt to recur during periods of stress. The medical report also indicated that the Contemnor-Appellant's scheduled appearance to testify before the Grand Jury was a source of great stress to him. Thus the stress of appearing before the Grand Jury substantially increased Contemnor-Appellant's risk of seizure and therefore jeopardized his life.

On March 2, 1977, the government presented Judge Frankel with a medical report by a government selected physician and requested that the Contemnor-Appellant be granted immunity pursuant to Title 18, U.S.C. Section 6002. This was the first opportunity that Contemnor-Appellant or his counsel had to read or respond to the contents of the government's medical report. The government's medical report contained no evidence which contradicted Contemnor-Appellant's contention that the stress of appearing before the Grand Jury would enhance his chances of suffering from another seizure. Judge Frankel granted immunity pursuant to Title 18, U.S.C. Section 6002 that same day and immediately thereafter (following Mr. Ciccone's insistence that he still would refuse to testify) granted the government's application for an Order of Confinement pursuant to Title 28, U.S.C. Section 1826 (a).

The Contemnor-Appellant was not given adequate opportunity to defend himself as is required by Rule 42(b). (Notice is not at issue in the sense of an awareness that the court would move for contempt.) Mr. Ciccone made the requisite showing that there was a substantial evidentiary question in issue. His reason for failing to testify was definite, specific, detailed and non-conjectural. It was therefore a denial of due process and an abuse of discretion for the Court to fail to order a hearing and to fail to give the Contemnor-Appellant adequate time to prepare his defense.

This is even more true in view of the fact that the government designated doctor had not unequivocally expressed in his report any opinion as to the possibility of danger to Mr. Ciccone.

"The determination of how much time is reasonable is committed to the sound discretion of the District Court. As we learned from Harris however, the proceedings cannot be conducted summarily, and in no event can the time be reduced below a minimum needed adequately to prepare a defense. A reasonable time will vary according to the circumstances of each case. When the alleged contemnor's defense raises legal issues of some complexity or there is an indication that an evidentiary hearing may be required to resolve factual issues, the five-day notice period prescribed by Rule 45(d) of the Federal Rules of Criminal Procedure (Rule 6(d) of the Federal Rules of Civil Procedure) should be adopted as the standard, absent a showing by the Government of some compelling need to shorten time. . ."
U.S. v. Alter, supra. at 1023.

Clearly, Contemnor-Appellant was not given sufficient time to prepare adequately for a full hearing. The government gave no reason for haste and it is clear that no harm would have occurred had the Court set a date two (2) days hence for the doctors to testify and submit more detailed affidavits.

Contemnor-Appellant was entitled to an "uninhibited adversary hearing" where he could develop his proof that he "has just cause to refuse the grand jury's demand." U.S. v. Dinsio, supra. at 1394. The summary proceedings before Judge Frankel included only brief oral discussion and the presentation of two (2) medical reports implying contradictory conclusions. Clearly the on-the-spot defense present here (after Contemnor-Appellant had only a brief opportunity to even read the government's medical report) is not the uninhibited and meaningful hearing necessary to satisfy the Due Process requirement.

It is apparent that Judge Frankel's failure to order a hearing and failure to give the Contemnor-Appellant adequate time to prepare his defense was clearly prejudicial and not a harmless error. Contemnor-Appellant was not given the opportunity to cross-examine the government's doctor. He was also not given time to bolster his own defense with further proof of his propensity to suffer from convulsive seizures when under stress.

Judge Frankel further abused his discretion in not ordering a hearing to provide himself with further information. He simply did not have enough evidence (relying as he did on two (2) medical reports implying contradictory conclusions) to determine whether or not the Contemnor-Appellant had just-cause for refusing to testify.

"The constitutional guarantee of due process of law means more than a silhouette of justice; it requires that judicial determinations affecting the freedom of the individual be openly arrived at after full, fair and vigorous debate on both sides of all substantial issues" U.S. v. Alter, supra. at 1024.

POINT II

THERE WAS NO SHOWING OF RELEVANCE
TO THE INVESTIGATION, BEFORE
CONTEMNOR-APPELLANT WAS HELD IN CONTEMPT

There must be at least a preliminary showing that that which a witness has withheld is relevant to the investigation being conducted by the Grand Jury. In the present case, Judge Frankel never had the Grand Jury minutes before him and never inquired as to the relationship between the question Mr. Ciccone refused to answer and the subject matter of the Grand Jury's investigation. The only information Judge Frankel possessed was the Assistant U.S. Attorney's allegation that the Contemnor-Appellant refused to answer "whether he knows an individual by the name of Thomas Mancuso."

The government must make a foundational showing to the Court of the relevance of the inquiry to the subject matter of the Grand Jury investigation in order to meet the mandates of the Due Process Clause. U.S. v. Dinsio, supra.

"The burden rests on the Grand Jury to show that the questions that the witness has refused to answer are relevant to the investigation for which he has been granted immunity." In re Vericker, 446 F.2d 244, 247-248.

Clearly, the Court here had inadequate information for concluding that the question asked the Contemnor-Appellant was relevant.

The Ninth Circuit exercised its supervisory powers in In re Grand Jury Proceedings, 507 F.2d 963 (1975), and required that when the government seeks enforcement of a grand jury subpoena it make a minimal showing by affidavit in every case that "each item sought was 1) relevant to an investigation, 2) properly within the Grand Jury's jurisdiction and 3) not sought primarily for another purpose" In re Grand Jury Proceedings, supra.

at 966. These affidavits are required "in every case irrespective of whether the witness has challenged the propriety of a subpoena" In re Grand Jury Proceedings, supra. at 965. With a rule so stringent in the Ninth Circuit, it seems apparent that, if not a written affidavit, a minimal showing of relevance is essential here. Such is clearly a constitutional mandate under U.S. v. Dinsio, supra.

It would shock the conscience to subject a man to a possible eighteen months in jail without first determining whether the question he refuses to answer is proper, relevant and within the legal scope of Grand Jury inquiry.

CONCLUSION

The proceedings in the case at bar denied the Contemnor-Appellant Due Process of Law and were, therefore, unconstitutional. His commitment under 28 U.S.C. Section 1826 (a) should be vacated and he should be returned to the District Court for a full hearing to determine the Contemnor-Appellant's ability to testify and the relevance of the question asked to the subject matter of the Grand Jury investigation.

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

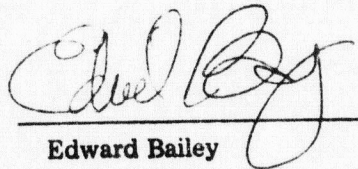
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

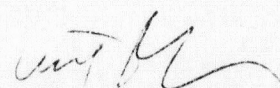
EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 11 day of May, 1977 at No. 1 St. Andrews Pl., NYC

deponent served the within *BRIEF*
upon U.S. Atty., So. Dist. of NY

the Appellee herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
11 day of May 1977


Edward Bailey


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978



COPIES RECEIVED
ROBERT B. FINE
MAY 11 1977
U.S. ATTORNEY
SOUTHERN DIST. OF N.Y.

